

Honorable Judge Benjamin Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER,

Plaintiff,

v.

JAMES M. PETERS, et al.,

Defendants.

No. C11-5424BHS

**PLAINTIFF'S REDRAFTED
RESPONSE TO DEFENDANT
DAVIDSON'S RENEWED
MOTION FOR SUMMARY
JUDGMENT**

NOTE ON MOTION

CALENDAR:

Friday, April 12, 2013

I. LAW AND ARGUMENT

Summary judgment is proper if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). A genuine dispute exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986). Courts draw all factual inferences in favor of the nonmoving party. *Costanich v. Dep't of Soc. & Health Services*, 627 F.3d 1101, 1113 (9th Cir. 2010).

A. Davidson is not a credible witness

Defendant Michael Davidson's ("Davidson") testimony in this case should not be relied on, as it is discredited by evidence of perjury. In ruling on Plaintiff's prior habeas petition, the Honorable Robert J. Bryan expressly stated, "Mr. Davidson . . . I believe -- that he's just not very credible, and I don't particularly believe what he has told us." Redrafted Declaration of Kathleen T. Zellner ("Zellner Dec."), Exhibit ("Ex.") QQ (Judge Bryan's habeas ruling), at pp. 522-23. Davidson has testified under oath no fewer than nineteen times that he did not visit Ray in jail. Zellner Dec., Ex. F (excerpts of Davidson deposition), pp. 108-112; Zellner Dec., Ex. RR (excerpts of Davidson habeas deposition), pp. 23-26; Zellner Dec., Ex. SS (excerpts of Davidson habeas hearing testimony), p. 78. However, over the past two and a half decades, Plaintiff ("Plaintiff" or "Ray") has consistently testified that Davidson: repeatedly visited him in jail, advised him that his wife, Shirley Spencer ("Shirley") did not love him anymore, attempted to convince Ray to plead guilty, attempted to get Ray to sign a quitclaim deed to the house he shared with Shirley, and attempted to force Ray to sign over his retirement check to Shirley. Zellner Dec., Ex. C. (excerpts of Ray's deposition), at pp. 179-81; Zellner Dec., Ex. NN (declaration of Ray Spencer), at ¶¶19, 21-25; Zellner Dec., Ex. TT (excerpts of Ray's habeas hearing testimony), pp. 162-165. Consistent with Ray's testimony, and contrary to Davidson's, Shirley testified that Davidson took a the quitclaim deed of her and Ray's marital home to Ray at the jail and attempted to have Ray sign it. Zellner Dec., Ex. A (excerpts of Shirley Spencer deposition), at p. 62. There is substantial evidence that Davidson and Krause subsequently conspired to forge Ray's name on the deed. *Infra*. p. 21. Lynda Harper, who worked at the Clark County Jail, has testified by affidavit that one officer from the sheriff's office continually visited Ray, causing Ray to become upset and file a complaint. Zellner Dec., Ex. UU (Dec. of Linda Harper), at ¶¶ 1-9.

B. Davidson is not entitled to qualified immunity based upon probable cause

“Law enforcement officers may obviously rely on statements made by the victims of a crime to identify potential suspects. But such information does not, on its own, support a finding of probable cause if the information is not reasonably trustworthy or reliable.” *Stoot v. City of Everett*, 582 F.3d 910, 919 (9th Cir. 2009). Here, there was no reasonably trustworthy or reliable information to support a finding of probable cause, and, unlike the cases cited by Davidson, no reasonable investigators in Defendants’ position would have believed their conduct was lawful.

Like Krause, Davidson cites Kathryn Spencer’s (“Kathryn”) alleged disclosures to Shirley on August 24, 1984 and Detective Flood on August 28, 1984 as evidence of probable cause. (Dkt. 133, p. 17). Krause directly contradicted this assertion in her deposition when she admitted that as of September 21, 1984, almost a month after Kathryn’s alleged “disclosures,” there was no probable cause. Zellner Dec., Ex. G (excerpts of Krause deposition), at p. 49-51.

Krause’s clear admission, which is overwhelmingly supported by the evidence, defeats the argument that Kathryn’s alleged statements to Shirley or Detective Flood established probable cause.

Without question, there is a factual dispute as to what if anything Kathryn purportedly told Shirley and then Krause during subsequent interviews about being sexually abused.

Kathryn testified she does not remember saying things to Shirley, did not say those things to Shirley and would not have said many of those things because she would not have used such words. Zellner Dec., Ex. J (excerpts of Kathryn deposition), at pp. 85-87, 93-94. In fact, Kathryn denies that any conversation about sexual abuse took place while she and Shirley were laying on the floor in the living room. *Id.*, at p. 97. Kathryn explained that the only reference

1 to sexual abuse was made when Shirley and Kathryn were in the laundry room and Shirley
2 brought up the subject, asking Kathryn if her “daddy” had ever touched her inappropriately. *Id.*
3 Suspiciously, Shirley’s written summary attributed certain words to Kathryn in describing the
4 alleged sexual abuse, such as “pee-pee,” that were not used by Kathryn in Detective Flood’s
5 report (where she refers to her genitals as her “potty” and denies improper touching) and are
6 not used by her in the intense interview conducted by Peters. Zellner Dec., Grp. Ex. K (Flood
7 report), at p. 00404; (Dkt. 96); Zellner Dec., Ex. L (transcript of videotape).

8 Additionally, in her written summary Shirley claims that Kathryn was trying to touch
9 her breasts and vagina. At her deposition, however, Shirley demonstrated non-sexual touching
10 by Kathryn and admitted that Kathryn was not trying to undo her robe, but rather simply
11 attempting to hug Shirley. Zellner Dec., Ex. A, at pp. 27-28. Shirley explains that Kathryn
12 pushed Shirley’s hand “just below tummy level” on Kathryn’s body. *Id.*, at p. 31. Clearly,
13 Shirley distorted her interaction with Kathryn because of her own unresolved sexual trauma as
14 a child. *Id.*, at p. 16. Shirley proceeded to memorialize these distortions in her written
15 summary in order to report these events to the authorities because, as she explained, she was
16 ignored as a child when she tried to report her own sexual abuse. *Id.*

17 Any reasonable officer, after performing even a cursory investigation, would have
18 realized that Shirley was an unreliable witness. She was emotionally unstable, obsessively
19 jealous of other females, violent, and potentially suicidal. Zellner Dec., Ex. C, at pp. 39, 48;
20 Zellner Dec., Ex. B (Krause report from various dates), at pp. 6, 9. She had been sexually
21 abused by her father, who was a police officer, and by her uncle and brother. Zellner Dec., Ex.
22 A, at pp. 6, 16. Ray was her fourth husband. *Id.*, at pp. 14-15. She has contradicted herself
23 under oath throughout these proceedings and when confronted with prior statements attributed
24 to her, she repeatedly claims she was misquoted. Zellner Dec., Ex. A, at p. 109.

Shirley's written account of Kathryn's alleged statements is not credible and does not establish probable cause for additional reasons. Shirley wrote that Kathryn, who was five years old, accused numerous other perpetrators, including Deanne Spencer, Karen Stone and her older brother, Matthew Spencer ("Matthew"). Zellner Dec., Ex. A, at Dep. Ex. B at pp. 2, 5. Per the statement, Kathryn even went so far as to accuse Shirley of inappropriate touching: "[Kathryn] said I rubbed you." *Id.*, at Dep. Ex. B at p. 5. Rebecca Roe ("Roe") certainly recognized the problems presented by Kathryn's initial statements to Shirley:

2) Initial naming of multiple suspects is very disturbing and child explanation that she thought it wouldn't hurt Shirley's feelings as much just didn't make the disturbances go away. Combined with p. 5 of Shirley's handwritten statement, where child talked about rubbing Shirley, it creates questions about fact vs. fantasy. I believe this point is a built in reasonable doubt.

Zellner Dec., Ex. H (excerpts of Roe deposition), at pp. 73-74, and at Dep. Ex. 1, pp. 1-2. Shirley herself apparently did not believe Kathryn's alleged statement to be true, as she advised law enforcement that she believed Ray was innocent. Zellner Dec. Ex. B, at p. 6; Zellner Dec., Ex. G, at pp. 48-49.

Kathryn's statements to Detective Flood negated probable cause. *See* Zellner Dec., Ex. G, at p. 51. Flood reported that Kathryn "indicated that she did tell Shirley everything that Shirley advised me of but then when asked to explain it or asked specific questions about it, she would say that she couldn't remember the words so she couldn't tell me." Zellner Dec., Grp. Ex. K, p. 00404.¹ When Flood asked Kathryn if someone had touched her on her pee pee, Kathryn responded, "not daddy, no one," and explained that her mother touched her "potty" when applying medicine. *Id.*, at p. 404.

¹ As a further indication of her unreliability, what Shirley told Flood materially differed from the story she set forth in her written summary. As examples, Shirley told Flood nothing about Kathryn making accusations against multiple perpetrators, and Shirley did not write in her statement that Kathryn had watched her dad have sex. *Id.* at pp. 402-03.

1 Flood also talked to Matthew. Matthew said that he “knew nothing about what [they]
2 were talking about,” and that neither his mother nor father had ever touched him improperly.
3 *Id.*, at p. 405. He further stated that Kathryn had never said she had been abused and that
4 Kathryn “did tell stories and change her stories a lot” “usually to get out of trouble.” *Id.*
5 DeAnne Spencer (“DeAnne”), Matthew and Kathryn’s mother, showed immediate hostility
6 toward Ray but admitted to Flood that “neither Matthew or Kathryn [had told her] anything
7 about this.” *Id.*, at 406. DeAnne did explain that another man “bothered the children so [she]
8 would not let a man stay in the house any longer.” *Id.* Clearly Flood did not believe probable
9 cause to arrest Ray had been established because he took no further action. Certainly if he
10 believed Kathryn had been sexually abused by Ray, Ray would have been immediately
11 arrested.

12 Krause, however, continued her investigation despite Flood’s report and the children’s
13 denials that they had been abused. Krause traveled to Sacramento and met with Kathryn.
14 Krause took Kathryn to the mall and then to a hotel room, acts which Peters and Dr. Bernet
15 testified were improper. Zellner Dec., Ex. Q (excerpts of Peters deposition), at p. 154; Zellner
16 Dec., Ex. R (excerpts of Dr. William Bernet deposition), at pp. 53-54. According to Kathryn,
17 Krause bought her treats such as sodas, ice cream and hot chocolate, indicating to Kathryn she
18 would be rewarded if she said what Krause wanted her to say. Zellner Dec., Ex. J, at pp. 33-34,
19 37-38, 40, 43, 45. Kathryn testified that the clear message was if she accused Ray, she “was
20 going to get something out of it.” *Id.* at p. 40. Krause prepared written reports reflecting what
21 she claimed Kathryn had told her. Substantial evidence indicates that Krause fabricated the
22 statements attributed to Kathryn in her reports. *See infra*, Section C, pp. 13-14.

23 Davidson argues that Ray showed deception on a polygraph examination. (Dkt. 133, p.
24 15). This assertion is inaccurate. As to the first polygraph test, Dr. Abrams reported that “a

definite decision could not be reached.” Zellner Dec., Ex. S (report of polygraph examinations). For unknown reasons, a second polygraph with different questions was performed and Dr. Abrams reported that while Ray’s answers “were sufficient to be indicative of deception, Officer Spencer’s scores were not very high so that the examiner does not feel as certain about the validity of these findings as in most examinations.” *Id.* Notwithstanding these ambiguous results, Krause reported that the result was “minus 13.” Zellner Dec., Ex. B, p. 8. Plaintiff’s expert, Dr. Raskin, has testified Krause’s report is false because minus 13 would be “a clear, conclusive, deceptive result” and that is inconsistent with the Abrams’ report. Zellner Dec., Ex. T (excerpts of Dr. David Raskin deposition), at p. 135. Defendant Davidson, as a polygraph examiner who reviewed Krause’s reports and Dr. Abram’s report, would have known of this falsification. Zellner Dec., Ex. F, at p. 53. Davidson also would have known that the circumstances surrounding the polygraphs were suspect, and that Dr. Abrams, was a notoriously uncredible polygraph examiner. Zellner Dec., Ex. T, at pp. 24, 26-31, 52-53.

The polygraph result does not add to probable cause. Rather, the circumstances surrounding the test demonstrate Defendants’ willingness to fabricate evidence in a malicious effort to frame Ray.

Dr. Ann Link (“Dr. Link”) is a psychologist who conducted over 12 therapy sessions with Kathryn after she allegedly disclosed sexual abuse. Zellner Dec., Ex. U (excerpts of Dr. Link deposition), at p. 11. Throughout discovery, Defendants have cited the fact that Kathryn disclosed sexual abuse to Dr. Link as evidence of probable cause. *See, e.g.*, Zellner Dec., Ex. Q, at p. 136. Now, Defendants have quietly abandoned this contention because after Dr. Link’s deposition, they know it is false. Dr. Link testified that although Kathryn came to her office due to alleged sexual abuse, Kathryn never described being sexually abused by anyone. Zellner Dec., Ex. U, pp. 11-12; *Id.*, at Dep. Ex. 1 at ¶7. Dr. Link informed law enforcement that

1 Kathryn had not made any disclosures of abuse to her despite multiple sessions of therapy. *Id.*,
 2 at pp. 14-15; *Id.*, at ¶¶9-10. Dr. Link denied telling Peters that as of November 1, 1984
 3 Kathryn had described sexual abuse to her. *Id.*, at p. 27. Krause admitted in her reports, which
 4 Davidson reviewed, that Kathryn had not disclosed abuse to Dr. Link. Zellner Dec., Ex. EE,
 5 (Krause report of interview of DeAnne Spencer), at p. 3.

6 Unlike Krause, Davidson places particular emphasis on what he refers to as “excessive
 7 masturbation” and “sexualized behavior.” DeAnne, Kathryn’s mother, testified that she never
 8 had any concerns that Kathryn was excessively masturbating or exhibiting improper sexual
 9 behavior as a child. Zellner Dec., Ex. FF (excerpts of DeAnne Spencer deposition), at pp. 33,
 10 93. Defendant Peters admitted the “excessive masturbation” was an “inference” he drew.
 11 Zellner Dec., Ex. Q, p. 120. There is no credible evidence of sexualized behavior by
 12 Kathryn which supports probable cause.

13 On November 27, 1984, even after Krause had completed her first two interviews of
 14 Kathryn, King County Prosecutor Rebecca Roe opined that the case was not provable or
 15 fileable. Zellner Dec., Ex. H, at Dep. Ex. 1.² Likewise, Peters has repeatedly admitted the
 16 unreliability of Kathryn’s disclosures and the weakness of the case against Ray. *See* Zellner
 17 Dec., Ex. MM (James Peters letter to Columbian newspaper); Zellner Dec., Ex. KK, at Dep.
 18 Ex. 3 (Declaration of James Peters, July 12, 1996) at ¶15; Zellner Dec., Ex. Q, at p. 134. In
 19 fact, Peters testified in prior proceedings that he agreed with Roe’s assessment, so he “declined
 20 [the case] as a result.” Zellner Dec., Ex. KK, at p. 13. The only evidence that was obtained
 21 between Roe’s report and the filing of the information against Ray was Peters’ videotaped
 22 interview of Kathryn. This interview, which speaks for itself, confirms that there was no
 23 probable cause based upon any alleged statements of Kathryn. (Dkt. 96); Zellner Dec., Ex. L;

24 ² Roe made this assessment without knowledge of Kathryn’s medical exam.

1 *see also infra* I.D., pp. 17-18 (describing exculpatory value of videotape). After the videotaped
 2 interview, Defendants were aware that Kathryn repeatedly denied abuse, was subject to
 3 coercive and highly suggestive interrogation techniques, and was rehearsed by Peters using the
 4 anatomical dolls during the sixty six minute break.

5 In light of all the above, no reasonable officer could have believed probable cause
 6 existed at the time Ray was charged in January 1985.

7 Contrary to Davidson's argument, Hansen did not corroborate Kathryn's alleged
 8 disclosures.³ (Dkt. 133, p. 18) Davidson ignores the fact that Krause filed her official report
 9 ending the investigation on December 20, 1984, Zellner Dec., Ex. X (Krause report dated
 10 December 20, 1984), then relentlessly targeted Hansen, who had never disclosed any sexual
 11 abuse. As set forth in Plaintiff's Response to Krause's Second Motion For Summary
 12 Judgment, at Section B1, pp. 14-16, the circumstances surrounding those "allegations"
 13 demonstrate their falsity and the maliciousness of the investigation.

14 Davidson participated in the effort to fabricate the Hansen allegations. Recognizing that
 15 Ray was innocent, Ray was released on his own recognizance without restriction in January,
 16 1985, despite the fact that he had allegedly raped a five year old. Zellner Dec., Ex. XX (release
 17 agreement). Needing evidence against Ray, Defendants concocted a set up with Shirley at the
 18 Salmon Creek Motel on or about February 19, 1985. The first piece of evidence supporting a
 19 concerted plan is the fact that Shirley, without notice, dropped Hansen off with no pajamas,
 20 clothes, or toys, and insisted he spend the night. Zellner Dec., Ex. C, at p. 125; Zellner Dec.,
 21 Ex. A, at p. 84. At this time, Shirley and Ray were separated, Davidson's marriage was
 22 essentially over, and the evidence suggests Shirley and Davidson had established a relationship.

23 ³ The fact that Curtis was "happy" about the new abuse allegations of Matthew and Hansen demonstrated his
 24 concern about the existence of probable cause supporting the original charges, which he filed without knowledge
 of significant exculpatory information. Zellner Dec., Ex. W, at pp. 55-56; *see infra*.

1 See Plaintiff's Response to Krause's Second Motion for Summary Judgment, at Section A, pp.
 2 2-4. Shirley clearly knew Ray was innocent, as it would be incredible and unfathomable to
 3 believe that a mother would leave her child overnight with an alleged child-rapist and without
 4 any necessary overnight items. Additionally, Shirley dropped Hansen off after repeatedly
 5 telling Ray in the days and weeks prior that she could not spend time with Ray because she
 6 otherwise would not be able to "go through with this." Zellner Dec., Ex. C, at p. 125.

7 Further, the evidence clearly establishes that Krause began her relentless pursuit of
 8 Hansen at around this time and, for the first time, allegedly obtained disclosures. Plaintiff's
 9 Response to Krause's Second Motion For Summary Judgment, at Section B1, at pp. 13-15.
 10 This too is a fantastic coincidence. Krause thereafter collaborated with Peters (who testified he
 11 was not the lead prosecutor and too busy with other matters to be involved in this case (Zellner
 12 Dec., Ex. Q., at pp. 145-46)), to create an affidavit in support of an arrest warrant. Zellner Dec.,
 13 Ex. OO. Peters also collaborated with Davidson, instructing him to gather evidence at the
 14 Salmon Creek Motel. *Id.* Apparently no other law enforcement officer other than Krause,
 15 Davidson, and Peters assisted in formulating the arrest warrant affidavit. The only evidence
 16 Davidson collected was his observation that there was a television high on the wall in the hotel
 17 room. Zellner Dec., Ex. F, at p. 70. There was no dispute that Hansen spent the night in Ray's
 18 room. *Id.* Davidson looked for nothing else. *Id.* He did not remove any materials to
 19 determine if there were any fluids left in the room or interview potential witnesses. This
 20 indicates a lack of good faith and a knowledge that no real evidence would exist.

21 Davidson admitted that the existence of a television did nothing to corroborate sexual
 22 abuse. Zellner Dec., Ex. F, at p. 70. And, importantly, it corroborated nothing stated by
 23 Hansen. In her report, Krause indicates that Shirley said that Hansen said there was a television
 24 high on the wall in the hotel room. Zellner Dec., Ex. Y, at p. 8. Contrary to Krause's report, in

1 his affidavit in support of an arrest warrant, Peters attributed the existence of the television to
 2 Shirley. *Id.*, at p. 4. Shirley has testified that all of the information in the report regarding the
 3 Salmon Creek motel came from Krause, not her son. Zellner Dec., Ex. A, at p. 106. This
 4 evidence supports the inference that, recognizing a complete lack of corroboration to Krause's
 5 fabricated allegations, Defendants worked together to create the "corroborating" evidence of a
 6 high TV. The circumstances surrounding the events on or about February 19, 1985 at the
 7 Salmon Creek Motel support the inference that Defendants fabricated Hansen's alleged story.⁴

8 Tellingly, Davidson does not assert that any disclosures by Matthew corroborated
 9 Kathryn's alleged disclosures. Like Hansen, Matthew had never complained to anyone that
 10 Ray had sexually abused him prior to Davidson and Krause's "investigation." In fact, Matthew
 11 denied any abuse to Detective Flood, stating that neither his mother nor his father had taken
 12 any inappropriate actions toward him. Zellner Dec., Ex. K, at p. Spencer 00404. He denied
 13 any abuse when Krause first interviewed him in October, 1984. Zellner Dec., Ex. I, at p. 41,
 14 and at Dep. Ex. 1 at p. 3. Despite Matthew's denials, Krause pursued him and ultimately re-
 15 interviewed him on March 25, 1985. According to her report, Matthew again repeatedly denied
 16 he had been abused. *Id.*, at Dep. Ex. 1 at p. 5. Then, Krause brought up the possibility of a lie
 17 detector test. *Id.* Krause also told Matthew that Hansen must have been lying and suggested
 18 that Hansen was going to be in trouble since Matthew was denying the abuse. *Id.*, at Dep. Ex. 1
 19 at p. 6. Krause reported that after that threat, Matthew agreed that he too was abused. *Id.*, at
 20 Dep. Ex. 1 at p. 6-13. Matthew testified in his deposition that Krause's reports attributed words

21
 22 ⁴ Davidson claims that Hansen has consistently adhered to the accuracy of his disclosures, but documents of an
 23 interview with Hansen obtained through discovery demonstrate that Hansen told law enforcement in 2010 that he
 24 "has no recall of abuse that occurred at same time as brother and sister" and he "does not now recall all the abuse
 he earlier claimed." Zellner Dec., Ex. CC (notes of interviews with Hansen). Plaintiff attempted to depose
 Hansen, but he avoided service.

1 to him that he did not say.⁵ *Id.*, at pp. 47-51 61-68. He repeatedly testified that he never told
 2 Krause any of the things she wrote regarding sexual abuse of him, Kathryn, or Hansen. *Id.*, at
 3 pp. 64, 68, 91-92. Matthew has established the falsity of the Krause police reports regarding
 4 his alleged abuse by his father.

5 Defendants argue that Ray additionally made statements upon his arrest implicating
 6 himself in the abuse of Hansen. This, however, is a disputed issue of fact. Ray denied that he
 7 ever said, “I must have done it if Little Matt said I did, this can’t be my ex-wife this time.”
 8 Zellner Dec., Ex. C, at p. 154.

9 In sum, Plaintiff has carried his burden of showing that no reasonable officer could have
 10 believed that probable cause existed at any time to charge Ray.⁶ Therefore, Davidson is not
 11 entitled to qualified immunity. Because Curtis was not provided with accurate information
 12 prior to the charging decision and Defendants presented fabricated evidence to, and withheld
 13 material evidence from, the Magistrate that issued Ray’s arrest warrant, Davidson is not
 14 shielded from liability under *Smith v. Almada*, 640 F.3d 931, 937 (9th Cir. 2011), or *Newman v.*
 15 *County of Orange*, 457 F.3d 991, 993-94 (9th Cir. 2006), *cert. denied*, 549 U.S. 1253 (2007).
 16 See Plaintiff’s Response to Defendant Krause’s Second Motion for Summary Judgment, at
 17 Section B1, 16-17.

18 **C. Davidson is not entitled to qualified immunity for the deliberate fabrication of**
 19 **evidence**

20 Like Krause, Davidson conspicuously omits the third prong of liability under
 21 *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) and its progeny: that Defendants

22 ⁵ Davidson’s reference to a prior affidavit does not change this fact. (Dkt. 133, p. 10). Matt stated that in his prior
 23 affidavit he meant only to indicate that he “went along with what [Krause] had told me had happened to me.”
 Zellner Dec., Ex. I, at p. 101. Moreover, looking to the statements attributed to him, no reasonable officer could
 rely on Matthew’s allegations in good faith.

24 ⁶ See also Zellner Dec., Ex. M (Washington Court of Appeals order), at pp. 11-12 (citing numerous uncontested
 “irregularities” in the investigation).

1 deliberately misquoted and misrepresented witness statements in their investigative reports and
 2 declarations. *Costanich*, 627 F.3d at 1111-12. “When genuine issues of material fact arise
 3 regarding fabrication of evidence in a child abuse investigative report, a police officer is not
 4 entitled to qualified immunity.” *Id.*

5 With discovery completed, it has now become clear that there is a disputed fact as to
 6 whether Krause fabricated witness statements in her investigative reports. As set forth above,
 7 Shirley and Matthew have testified that they did not make statements attributed to them in
 8 Krause’s reports. Zellner Dec., Ex. A., at pp. 103-05; Zellner Dec., Ex. I, at pp. 47-51, 61-68.

9 Krause’s report claiming that Dr. Abrams advised that Ray’s second polygraph test resulted in
 10 a “minus 13” score, is also false, as Abrams’ written report contradicts that conclusion. Zellner
 11 Dec., Ex. B, p. 8; Zellner Dec., Ex. T, at p. 135. Krause manipulated indices to conceal
 12 Kathryn’s medical report. *See* Plaintiff’s Response to Krause’s Second Motion for Summary
 13 Judgment, at p. 5. And there is substantial evidence that Krause conspired with Davidson to
 14 forge Ray’s signature on the quitclaim deed to his house so that Shirley could sell that house
 15 and buy a new one with Davidson. *See infra*, Section I.E., pp. 20-21

16 As further evidence of fabrication, statements and conduct attributed to Kathryn in
 17 Krause’s reports are contradicted by Peters’ videotaped interview of Kathryn (Dkt. 96) and Dr.
 18 Link’s testimony. Krause’s reports depict Kathryn providing detailed disclosures of sexual
 19 molestation. Zellner Dec., Ex. Z, AA and BB (Krause reports of interviews with Kathryn).
 20 According to Krause’s reports, Kathryn addressed Krause by her first name and stated that she
 21 “really likes” Shirley. *E.g.*, Zellner Dec., Ex. Z, at p. 4. In the videotaped interview, however,
 22 Kathryn rarely uttered words, preferring to shake her head no and yes. (Dkt. 96); Zellner Dec.,
 23 Ex. L, at p. 25. Kathryn routinely denied abuse until after she was rehearsed during the break.
 24 *Id.*, at p. 46. Contrary to Krause’s reports, Kathryn stated that she “hates” Shirley. *Id.* at p. 53.

1 Kathryn never addressed Peters by name. *See generally, Id.* Kathryn's therapist, Dr. Link,
 2 testified consistently with the videotape, stating that Kathryn was "withdrawn" and non-verbal.
 3 Zellner Dec., Ex. U, at p. 10. Dr. Link also testified Kathryn never disclosed any abuse to her.
 4 *Id.*, at p. 12. Comparing Krause's representations of Kathryn's demeanor and statements with
 5 her actual demeanor and statements as seen on the videotape and testified to by Dr. Link,
 6 demonstrates the falsity of Krause's reports. It would be incredible to believe that Krause
 7 obtained the disclosures listed in her reports, but Peters (using coercive techniques) and Dr.
 8 Link (using therapeutic psychological techniques) were unable to do the same. All of the above
 9 provides substantial evidence of deliberate fabrication of evidence by Krause. *Costanich*, 627
 10 F.3d at 1111-12.

11 Defendant Davidson's reliance on Dr. Bernet's report is irrelevant to this claim. No
 12 expert is required to deduce from the evidence presented that there is a genuine dispute as to
 13 whether Krause deliberately misquoted, misrepresented, and fabricated her reports.⁷ Dr. Philip
 14 Esplin's opinion that "very few children . . . have ever been found to exaggerate or to invent
 15 claims of sexual molestation" (Dkt. 133, p. 5) only serves to support Plaintiff's contention that
 16 Defendants created the allegations. Additionally, any reliance on Dr. Esplin's analysis
 17 regarding the standard of care in 1984-1985 is irrelevant, as this is not a standard of care case.

18 And second, the same evidence set forth above establishing a lack of probable cause
 19 demonstrates genuine issues of material fact as to whether Defendants continued the
 20 investigation despite the fact they knew or should have known Ray was innocent and whether
 21 Defendants knew or should have known their pursuit of Ray was based upon unreliable and/or
 22 false information.

23
 24 ⁷ See *Costanich v. Dep't of Soc. & Health Services*, 627 F.3d 1101, 1113 (9th Cir. 2010); *United States v. Strem*,
 959 F.2d 243 (9th Cir. 1992) (noting that an expert is not permitted to testify as to witness credibility).

Further, the videotaped interview demonstrates that Kathryn repeatedly denied abuse and affirmed leading questions only after significant and unreliable coaching and manipulation. (Dkt. 96); Zellner Dec., Ex. L; Zellner Dec., Ex. DD (Washington Supreme Court order), at p. 6. And Dr. Link testified that Kathryn never disclosed abuse to her. Zellner Dec., Ex. U, at pp. 14-15.⁸

Davidson contends that Plaintiff has presented no evidence that he personally participated in any child interviews that he knew or should have known were so coercive and abusive that false information would result. (Dkt. 133, at p. 19). Likewise, Davidson repeatedly asserts ignorance as to the actions of Krause and Peters. (Dkt. 133, at pp. 10-16). Davidson admits, however, that even if this were true, he may still be held liable under a supervisory liability theory. (*Id.* at 19). According to the Ninth Circuit, “In a section 1983 claim, “a supervisor is liable for the acts of his subordinates if the supervisor participated in or directed the violations, or knew of the violations of subordinates and failed to act to prevent them.” *Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009).

Davidson is liable under *Corales*. As a preliminary matter, Plaintiff has presented sufficient evidence of a conspiracy, which also establishes evidence of his participation in, and knowledge of, the constitutional violations. *See infra* Section E, pp. 20-23; Plaintiff’s Response to Krause’s Second Motion for Summary Judgment, at Section A, pp. 2-7. As a supervisor, Davidson’s job was to review what follow-up needed to be done in the investigation, and learn if there were problems within a particular investigation or with particular witnesses. Zellner Dec., Ex. F, at p. 12, 62. In this case, Davidson would have reviewed the reports authored by Krause. *Id.*, at p. 53. Davidson gave suggestions to Krause

⁸ Krause, and Davidson by review of Krause’s reports, were aware of the videotaped interview and Kathryn’s refusal to disclose any abuse to Dr. Link. Zellner Dec., Ex. EE (report of interview October 18, 1984 with DeAnne Spencer), at p. 3.

on how to conduct her investigation. *Id.* at 63-64. It is undisputed that Davidson was greatly involved in the two polygraphs. Davidson also participated in victim interviews. Zellner Dec., Ex.WW (Shirley habeas deposition, June 4, 1996), at p. 5; Zellner Dec., Ex. RR, at p. 14; Zellner Dec., at Ex. F, at p. 97. Davidson admits that during the course of the investigation, he was aware of the videotaped interview of Kathryn conducted on December 11, 1984. *Id.*, at p. 72. Davidson had this knowledge in spite of the fact that no report regarding this interview was ever generated; Davidson admits “the normal course would be that [the investigator] would author a report pertaining to an interview of a victim or witness or suspect.” *Id.*, at p. 81. Davidson admits he was aware of the inconsistencies in Kathryn’s alleged story from the beginning of the investigation. *Id.*, at p. 24.

Plaintiff has carried his burden of establishing liability under *Devereaux* and *Costanich*. *See supra*; Plaintiff’s Response to Krause’s Second Motion for Summary Judgment, at Section B2, pp. 17-20. Plaintiff has also carried his burden of establishing that Davidson participated in or directed the deprivations of Ray’s constitutional rights, or knew of the violations of subordinates and failed to act to prevent them.

D. Davidson is not entitled to qualified immunity for his *Brady* violations

Davidson again pleads ignorance with respect to the concealment of material evidence, including the videotaped interview of Kathryn, the medical reports of Kathryn and Hansen, and the November 27, 1984 assessment of Roe. (Dkt. 133, at p. 22-23). The evidence set forth *supra* p. 16 supports the existence of a genuine dispute as to whether Davidson was aware of the videotape and deliberately concealed it. Additionally, with respect to the medical reports, Krause has admitted she received a copy of the report, and that she drafted a utility report on the subject. (Dkt. 139, p. 20); Zellner Ex. E, at pp. 14-15. Davidson, in turn, admitted that the protocol for an allegation of rape would be to refer the victim for an examination, and that he

1 reviewed the progress of the case, including reports. Zellner Dec., Ex. F, at pp. 12, 24, 98-99.

2 When asked whether she discussed the fact that Hansen had been examined with either Krause
 3 or Davidson, Shirley testified, "I'm sure I did because they told me to go." Zellner Dec., Ex.
 4 WW (Shirley habeas evidence deposition), p. 10. Additionally, given the evidence that Krause
 5 knew of the Hansen report, *see* Plaintiff's Response to Krause's Second Motion for Summary
 6 Judgment, at Section p. 21 and the evidence of Davidson's relationship with Shirley, it is
 7 reasonable to infer that Davidson knew of it as well. As the supervising investigator in this
 8 case, who actively participated in various aspects of the investigation, it is also reasonable to
 9 infer that he reviewed the Roe report, which was sent to his reporting officer. Zellner Dec., Ex.
 10 H, at p. 62. Davidson's self-serving testimony that he does not recall the medical exams, Roe
 11 report, or videotape, is not credible. *Supra* p. 2.

12 Davidson also argues that the "videotaped interview of Kathryn was, at best, cumulative
 13 impeachment evidence that arguably had a tendency to show Kathryn was inconsistent or not
 14 credible⁹ -- at times she denied sexual abuse by her father during the course of the interview
 15 and at other times described the abuse, just as she had previously done during Detective
 16 Flood's interview."¹⁰ (Dkt. 133, p. 22). This is refuted by the tape. For example:

- 17 • Kathryn said "Nothing happened last summer." Peters asked, "Nothing?" and Kathryn
 18 nodded her head no. DeAnne said, "Okay. Deep Breath." To which Kathryn
 19 responded, "Mom, nothing happened last summer." *Id.*, at p. 25.

21 _____
 22 ⁹ Davidson's assertion that the tape could demonstrate that Kathryn is not credible constitutes an admission that
 the video is exculpatory. (Dkt. 133, at p. 23).

23 ¹⁰ Significantly, Davidson does not contend that Kathryn's statements in the videotape are consistent with those
 24 attributed to her in Krause's reports. The fact that Kathryn's alleged statements in the Krause reports are so
 contrary to those in the videotape create a genuine dispute as to whether Krause's reports are fabricated.

- 1 • By Plaintiff's counsel's count, Kathryn said the word "no" 46 times, shook her head no
2 100 times, and stated words to the effect of "nothing happened" or "they didn't really" 5
3 times. *See generally* Zellner Dec., Ex. L.
- 4 • Kathryn was subjected to extensive coaching, suggestion, and manipulation throughout
5 the interview. *Id.*, at pp. 10, 12, 18, 21-22, 24-26, 28-30, 39. DeAnne told Kathryn that
6 if she cooperated they would have the whole day together. She then stated, "Okay.
7 then let's get Ray one more time." *Id.*, at p. 40.
- 8 • Kathryn made a number of inconsistent statements and directly contradicted those
9 attributed to her in Krause's and Shirley's reports. *Id.*, at pp. 33, 51, 53, 55.
- 10 • Peters and DeAnne spent considerable effort to get her to indicate that the penis was
11 erect, going so far as to indicate with their fingers and using the dolls. Kathryn
12 repeatedly answered no. *Id.*, at pp. 37-38, 48-49.
- 13 • After Kathryn repeatedly refused to offer Peters the information he sought, Peters
14 decided to take a break. Peters is seen lying on the floor with Katie after the break.
15 Kathryn testified that she was coached during the break. Dec., Ex. J, at pp. 72-73, 99.
16 This is corroborated by Peters' statement immediately after the break: "So what I
17 would like you to do is show me now while the camera is going what you showed me
18 while the camera was off." Zellner Dec., Ex. L, at p. 47. Kathryn positioned the dolls
19 in two different ways. When Peters asked, "What else? Anything else?" Kathryn said,
20 "I forgot the last thing." *Id.*, at p. 47. When asked, "did all this happen last summer
21 when you were up here," Kathryn asked DeAnne, "Did it happen last summer?" *Id.*, at
22 pp. 58-59.

23 The video demonstrates that Kathryn was unable to articulate or verbalize any sexual
24 abuse, despite extraordinary coercion, suggestion, coaching, inducements, and other unreliable

1 interview techniques. This is exculpatory evidence that Shirley's written summary was wholly
 2 unreliable and Krause's prior reports were demonstrably false. Indeed, it "undercuts the theory
 3 of the case." *See Zellner Dec., Ex. DD, at p. 6.*

4 By failing to disclose the above-described information, Davidson violated Ray's
 5 constitutional rights. The Constitution requires that a guilty plea be "intelligent and voluntary."
 6 *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995). A plea cannot meet this standard
 7 if "there is a reasonable probability that but for [its disclosure], the defendant would have
 8 refused to plead and would have gone to trial." *Id.* Here, as explained above, the videotaped
 9 interview alone is exculpatory and material. *See also Zellner Dec., Ex. DD, at p. 6; Zellner*
 10 *Dec., Ex. W* (excerpts of Curtis deposition), at p. 37. The medical reports establish that there
 11 was no physical corroboration of the alleged disclosures. And the Roe report provides an
 12 expert opinion recommending that the case not be prosecuted. Had Ray, or any reasonable
 13 person in his position, known of this information, he would not have pled guilty. *Zellner Dec.,*
 14 *Ex. C, at p. 153.*

15 Davidson does not refute the materiality of the withheld evidence. Instead, he relies on
 16 *United States v. Ruiz*, where the Court held, "[T]he Constitution does not require the
 17 Government to disclose material impeachment evidence prior to entering a plea agreement with
 18 a criminal defendant." 536 U.S. 622, 633 (2002) (emphasis added). *Ruiz* does not apply to this
 19 case because Defendants withheld exculpatory, rather than impeachment evidence. *United*
 20 *States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005); *McCann v. Mangialardi*, 337 F.3d 782,
 21 788 (7th Cir. 2003); *State v. Huebler*, 275 P.3d 91, 96-98 (Nev. 2012). And unlike the
 22 defendant in *Ruiz*, Ray did not plead pursuant to an agreement waiving his right to material
 23 information. *Zellner Dec., Ex. LL* (Omnibus Application); *see also State v. Harris*, 667
 24 N.W.2d 813, 818-822 (Wis. 2003); *U.S. v. Ruiz*, 241 F.3d 1157, 1164-65 (9th Cir. 2001)

(question in *Ruiz* was distinct from *Sanchez*). *Ruiz* does not excuse Davidson's failure to disclose the videotape during Ray's 25 year long quest for justice. *See Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1094 (9th Cir. 2009)

E. Plaintiff has presented sufficient evidence of a conspiracy

The elements to establish a cause of action for conspiracy under § 1983 are: "(1) the existence of an express or implied agreement among the defendant officers to deprive a person of his constitutional rights, and (2) an actual deprivation of those rights resulting from that agreement." *Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir. 2010). The agreement or "meeting of the minds" between the defendants "need not be overt, and may be inferred on the basis of circumstantial evidence such as the actions of the defendants." *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010). "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *Id.*

Davidson's arguments as to a lack of conspiracy mirror Krause's and are misplaced for the same reasons. *See* Plaintiff's Response to Krause's Second Motion for Summary Judgment, at Section A, pp. 2-7, incorporated by reference herein. Davidson's contention that his relationship with Shirley did not begin until after Ray was convicted, which he supports with the self-serving and unreliable testimony of himself and Shirley, is rebutted by the admissible evidence. *Id.*, at pp. 2-4.

One of the most compelling and powerful pieces of evidence of a conspiracy and fraud that has emerged in the instant case is Davidson's role in forging Ray's signature on the quitclaim deed to Shirley and Ray's marital home while Ray was in jail. Shirley testified that she took the quitclaim deed to the house she shared with Ray to Krause at the sheriff's office.

Zellner Dec., Ex. A, at p. 62. Krause gave the deed to Davidson to "see if he could have Ray

1 sign it.” *Id.* Ray refused to sign the deed when Davidson brought it to him in jail. *Id.*
 2 Subsequently, Ray’s signature was forged on the deed. Zellner Dec., Ex. VV (declaration of
 3 Ray Spencer), at ¶¶6-7. Menona Landrum, the notary whose seal and purported signature
 4 appear on the deed, worked at the sheriff’s office. (Dkt. 147 (Declaration of Menona
 5 Landrum), at ¶1). She kept her notary seal in an unlocked desk drawer, has no memory of
 6 notarizing the signature of any jail inmate on a quitclaim deed or any other type of document,
 7 and to her knowledge has never met Ray. (*Id.*, at ¶¶ 4-6). In May of 1985, Shirley moved out
 8 of that house, filed for divorce in early June, and she and Davidson purchased another house in
 9 the fall of 1985. Zellner Dec., Ex. A, at pp. 116-18, 148. The forged quitclaim deed allowed
 10 Shirley to dispose of her house with Ray so that she and Davidson could purchase their own
 11 house. *Id.* Davidson and Krause’s collaboration in obtaining a forged quitclaim deed shows a
 12 conspiracy and fraud perpetrated against Ray.

13 There is compelling evidence on the conspiracy claim against Davidson regarding the
 14 polygraph examinations. Ray voluntarily appeared for two polygraph exams conducted at the
 15 Clark County Sheriff’s Office. During the exams, Davidson met with Shirley in his office.
 16 Zellner Dec., Ex. A, at p. 54. Davidson, the polygrapher at the sheriff’s office, learned that the
 17 results of Ray’s first polygraph were “inconclusive.” Zellner Dec., Ex. S. As evidence of his
 18 malicious objective to prosecute Ray despite his innocence, Davidson told Ray he had
 19 “failed.”¹¹ Zellner Dec., Ex. C, at p. 65. Thereafter, Davidson met with Krause and Abrams to
 20 formulate new questions that Davidson and Krause intended to provide deceptive results.
 21 Zellner Dec., Ex. B, at p. 8. The resulting questions were “substantially different” from the
 22 first exam, making their results inherently weak. Zellner Dec., Ex. T, at p. 52. As noted by

23
 24 ¹¹ DeAnne was excluded as a suspect after taking a polygraph, Zellner Dec., Ex. FF, at p. 42-43, and Stone was
 excluded even after refusing to take one. Zellner Dec., Ex. YY, pp. 5-7. Defendants continued investigation of
 Ray despite a non-incriminating polygraph showed their malicious prosecution.

1 Plaintiff's expert, Dr. Raskin, "[T]he most serious allegation, the sexual penetration, was not
2 even included in the second test, and there is no explanation of that." *Id.*, at p. 52. Raskin
3 testified that this omission made him "suspect that there is a lot of stuff going on there that is
4 manipulation to obtain a particular desired result." *Id.*, at p. 53.

5 The results of the second polygraph were ambiguous. Abrams stated that while there
6 was indication of deception, "Officer Spencer's scores were not very high so that the examiner
7 does not feel as certain about the validity of these findings as in most examinations. Hopefully,
8 further corroboration will be obtained." *Id.*, at Dep. Ex. 2. Krause reported, however, that the
9 result was a "minus 13." Zellner Dec., Ex. B, p. 8. Raskin has testified Krause's report is false
10 because minus 13 would be "a clear, conclusive, deceptive result" and that is inconsistent with
11 the Abrams' report. Zellner Dec., Ex. T, at p. 135. Davidson reviewed Krause's reports and
12 was aware of this false report. The circumstances surrounding the test demonstrate
13 Defendants' willingness to fabricate evidence (collaboratively) in a malicious effort to frame
14 Ray.

15 Also of particular note with respect to Davidson is his testimony indicating that he
16 supervised the investigation in collaboration with Defendant Peters. Zellner Dec., Ex. F, at p.
17 129. Additionally, Davidson stated that Peters was involved in the investigation during the
18 initial allegations and that he "had specific conversations with Mr. Peters during the course of
19 the entire investigation." Zellner Dec., Ex. F, p. 46, *see also* Zellner Dec., Ex. RR, at p. 37.
20 Davidson and Peters' participation in the investigation and corroborative supervising of
21 Krause's work demonstrate a "meeting of the minds."

22 Davidson points out that Ray admitted he has "no way of knowing when the affair
23 started." (Dkt. 133, p. 13). But this statement is irrelevant, as the nature of a conspiracy
24 necessary precludes the plaintiff from obtaining specific information. *Crowe*, 608 F.3d at 440.

Davidson's argument that Defendants lack a common objective is also refuted by the evidence and the law. *See* Plaintiff's Response to Krause's Second Motion for Summary Judgment, at Section A, p. 4-5.

Like Krause, Davidson ignores the substantial amount of exculpatory evidence that was not disclosed to Ray, which provides a sufficient basis for a jury to find the existence of a conspiracy. *Id.* at pp. 5-7. Davidson claims ignorance to this exculpatory material, but, as explained above, there is substantial evidence refuting his claim. And finally, but importantly, Kathryn and Matthew's testimony that Ray did not sexually molest them in any way, Matthew's testimony that he did not tell Krause the things attributed to him in the reports, and Kathryn's testimony that she was coached and induced by Defendants further establishes that Defendants acted contrary to the evidence and pursuant to a conspiracy with the common goal of framing Ray. *Id.* at p. 7.

F. Davidson proximately caused Ray's damages

As with Krause, there is substantial evidence that Davidson directly participated in the deprivation of Ray's rights, and there can be little question that Davidson knew or reasonably should have known that her acts in this case would cause others (i.e., Arthur Curtis or the court) to inflict a constitutional injury. Therefore, he cannot shirk liability based on a proximate causation theory. *See Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1997); *Blankenhorn v. City of Orange*, 485 F.3d 463, 482 (9th Cir. 2007); *Osborn v. Butler*, 712 F. Supp. 2d 1134, 1159 (D. Idaho) (proximate cause established where court was merely a "conduit for the wrongful action which proceeded.") Davidson cannot avoid liability under *McSherry* because Mr. Curtis did not make an independent prosecuting decision. The issue is not, as Davidson contends, that Krause concealed the information contained in her reports, it is the fact that Krause concealed Defendants' fabrication of evidence and exculpatory evidence.

II. CONCLUSION

For all the foregoing reasons, as well as the reasons and evidence set forth in Plaintiff's prior Rule 56(d) motions and his Responses to Davidson's co-defendants' motions for summary judgment, which are incorporated herein by reference, Plaintiff respectfully requests that this Court deny Defendant Davidson's Renewed Motion for Summary Judgment

RESPECTFULLY SUBMITTED this 21st day of March, 2013.

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DECLARATION OF SERVICE

I hereby certify that on March 21, 2013, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the attorneys of record as follows:

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